No. 18-726

In the Supreme Court of the United States

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellants,

v.

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellees.

On Appeal from the United States District Court for the District of Maryland

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INTRODUCTION

A State may not inhibit "the political participation of some in order to enhance the relative influence of others." *McCutcheon* v. *FEC*, 572 U.S. 185, 191 (2014). Given this insuperable principle, counsel for the State agreed last Term that if "the Maryland legislature passed a statute and said, in the next round of reapportionment, we're going to create seven Democratic districts and one Republican district," it would be unconstitutional "viewpoint discrimination." Tr. 45:9-47:22, *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333). Yet in practical effect, that is exactly what Maryland did during the 2011 congressional redistricting process.

Since receiving an eighth congressional seat in 1963, Maryland voters had generally sent five or six Democrats and two or three Republicans to the U.S. House of Representatives, roughly reflecting the breakdown of Maryland's electorate. But Governor Martin O'Malley and Democratic officials in control of the Maryland legislature disapproved of citizens' successful support of the incumbent Republican congressmen in the State's First and Sixth Districts. These officials considered it their duty to bring that success to an end—to break the majority in one of Maryland's two Republican districts and ensure a "7-1" delegation. The record overwhelmingly confirms this goal.

Early on, according to Governor O'Malley, "a decision was made to go for the Sixth." 1JA44. To that end, mapdrawers methodically dismantled the Sixth District, breaking apart large swaths of territory dominated by rural Republicans and replacing them with smaller, densely populated areas dominated by suburban Democrats. In total, the mapdrawers cut more than 360,000 citizens out of the district and jammed around 350,000 back in—vastly more than the

10,189-person adjustment necessary to comply with the one-person-one-vote rule. The result was a 90,000-voter swing in favor of registered Democrats—a political earthquake for a district where typically 230,000 voters cast ballots in midterm elections.

The gerrymander was a resounding success. Republican votes were diluted so substantially that a Democrat has won every election since 2011—including in 2014, a wave year for Republicans. Interest in Republican congressional politics in the district has also declined significantly. As supporters of the Republican Party in the area have become disengaged and disinterested, fewer voters have turned out for the primaries, and party fundraising has fallen off.

As the district court held below, the 2011 gerrymander violated appellees' First Amendment rights. For its part, the State now candidly admits (Br. 27) that "excessive partisanship in districting is impermissible." And it does not deny that government regulation may not favor some citizens over others on the basis of their political views. The State's position, instead, is that the First Amendment framework employed below is not cognizable in federal court.

That is wrong. The Court has held repeatedly that election regulations may not unduly "burden[] the availability of political opportunity" of particular groups of citizens on the basis of their political views. *Clements* v. *Fashing*, 457 U.S. 957, 964-65 (1982). In particular, "schemes that impose burdens on new or small political parties or independent candidates" violate "First Amendment interests in ensuring freedom of association" when they concretely inhibit individuals' "association with particular political parties" and "mak[e] it virtually impossible for" candidates from disfavored parties to achieve electoral success. *Ibid.* Accord, *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780

(1983); *Cook* v. *Gralike*, 531 U.S. 510 (2001). That is exactly what a partisan gerrymander does—and if those burdens are capable of principled evaluation in the ballot-access context, they are equally so here.

Application of the First Amendment to partisan gerrymandering would not outlaw politics in redistricting; mapdrawers would be free to use political data in pursuit of balanced and competitive maps, and to undo past gerrymanders. The First Amendment framework provides a more workable and analytically sound approach to evaluating the problem of partisan gerrymandering—it focuses on *what kind* of political considerations are impermissible, not just *how much* political consideration is too much. Many political considerations that play important, proven roles in redistricting remain lawful under the First Amendment.

STATEMENT

A. Factual background

1. ***The drafting process.*** Maryland set out after the 2010 Census to redraw its congressional district lines. The redistricting process was overseen by then-Governor Martin O'Malley, who set in motion two parallel procedures for drafting a new map. The first was a public-facing process led by the Governor's Redistricting Advisory Committee (GRAC). The second was a backroom process led by key legislative staffers and Maryland's Democratic congressional delegation, together with the consulting firm they hired.

Governor O'Malley appointed all five members of the GRAC, including chair Jeanne Hitchcock, Speaker of the House Michael Busch, and Senate President Thomas "Mike" Miller. 3JA657 (¶¶19-20).

The GRAC's mission was "to solicit public input on the map, hold a number of public hearings all around

the state, and allow people to voice their concerns, their desires." 1JA36. It held 12 public hearings during the summer of 2011 concerning both federal congressional and state legislative redistricting plans. 3JA657 (¶22). Because the GRAC was not itself drafting the map, however, there is no evidence that any relevant public comments were actually taken into account by the mapdrawers.

At the same time that the GRAC's public hearings were being held, Governor O'Malley tasked Maryland's Democratic members of Congress—led by confessed "serial gerrymanderer" Steny Hoyer (2JA581)—with drafting the redistricting plan. See 1JA57. Accord 1JA198 (Maryland Senate President Mike Miller testifying that the map "primarily was drawn by the congressional people").

Congressman Hoyer, in turn, retained NCEC Services to draw the delegation's map. 1JA99-100. NCEC "specializes in electoral analysis, campaign strategy, political targeting, and [mapdrawing] services" (3JA761), exclusively for the Democratic Party (1JA97).

NCEC's Eric Hawkins was engaged to analyze Maryland's 2011 redistricting plan and to draw maps. 3JA762. He used software called Maptitude for Redistricting. 1JA219. Maptitude allows users, among other things, to "create districts using any level of geography," "add political data and election results," and "update historic election results to new political boundaries." 3JA659 (¶28); 3JA676-87.

Detailed data reflecting Maryland citizens' voting histories and party affiliations were compiled for use in the redistricting process (3JA659 (¶29)), including precinct-level data on "voter registration, voter turnout and election results" (1JA175). Accord 4JA936-37.

To evaluate the predicted electoral outcomes of the draft maps, Hawkins (and others) used this data and a proprietary metric called the Democratic Performance Index, or DPI. 1JA93, 126. Accord 4JA936-37. Whereas a score above 50 indicates a district likely to be won by a Democrat, a score below 50 indicates a district likely to be won by a Republican. See 4JA1123-24. The DPI is, in short, a metric that predicts future electoral outcomes by analyzing "past voting history." 1JA93. Voting history is the most reliable indicator of future voting behavior. See Dkt. 210, at 10-12.

Hawkins worked directly with Maryland state officials to draft the 2011 redistricting map. While the DPI belongs exclusively to NCEC (1JA126, 188), references to "democratic performance" and "DPI" appear throughout documents produced by Maryland state lawmakers and their staffers. 3JA789-92. The map files produced by Jake Weissmann—the Miller staffer who was "primarily charged with using the Maptitude software to create draft plans" onsite (4JA936-37)—had the DPI metric built into them. 4JA1087; 4JA936 (¶4). And emails confirm that Weissmann was actively collaborating with Hawkins through the end of the mapdrawing process. 3JA823, 825.

Hawkins drew upwards of ten draft maps and analyzed how they would affect the outcomes of future elections if adopted. 1JA100-01. According to a September 15, 2011 NCEC spreadsheet, he carefully analyzed at least six potential maps alongside proposals submitted by third parties. 3JA794-97. Each of the six NCEC-drafted options would have resulted in a federal DPI of 52 or greater for the Sixth District. *Ibid.* The maps proposed by third parties (and rejected by lawmakers) would have resulted in a far smaller DPI for the Sixth District. *Ibid.* The maps proposed by the Legislative Black Caucus, for example, would have

resulted in a federal DPI well below 50. 3JA794. As Jason Gleason, a staffer to Congressman Sarbanes, lamented, the Black Caucus proposal was "a recipe for 5-3 not 7-1." 3JA822.

After conferring with Maryland legislative staffers and refining the maps (1JA144-47, 86-87), two conceptual blueprints were presented for the redistricting plan: "Congressional Option 1" and "Congressional Option 2." 4JA1089, 1097-98. The DPI score for Option 1 was lower than it was for Option 2. 4JA1089.

Maryland officials deemed Option 1 "not acceptable" (4JA937 (¶9)) and thus pressed forward with Option 2, which became the blueprint for the map that was ultimately enacted. One of the notable differences between Option 2 and the final map is that the DPI increased yet further. 3JA826.

After Senate President Miller introduced the final map in the Senate, Democrats jammed the bill through both legislative chambers in just two days (3JA660 (¶34)), leaving no time for debate. The bill was enacted without the support of a single Republican lawmaker (3JA660 (¶36)), none of whom even saw the final map until it was introduced in the Senate.

2. ***Intent.*** Governor O'Malley and others involved in the redistricting have candidly acknowledged their intent to prevent Republican voters in the Sixth District from reelecting Congressman Roscoe Bartlett.

According to Hawkins, the dual "goals" of his consulting arrangement were to maximize "incumbent protection" for Democratic members of Congress and to increase the DPI of the Sixth District "to see if there was a possibility for another Democratic district." 1JA107-08. The goal, in other words, was to change the composition of the delegation from six Democrats and two Republicans (a "6-2" plan) to seven Democrats and

one Republican (a "7-1" plan). 1JA104. Accord 1JA108 (Hawkins testifying that the plan was to create "a seventh [Democratic] seat, regardless of where it was, just to create a 7-1 split").

Hawkins explored two ways of drawing a 7-1 map: one that cracked the Republican majority in the First District and one that cracked it in the Sixth District. 1JA105-06. Because Maryland lawmakers were concerned that targeting the First District would require "jumping over the Chesapeake Bay" (1JA77), they chose the Sixth District (1JA44). As Governor O'Malley explained in deposition: "Was a decision made? I suppose in the sense that we decided not to try to cross the Chesapeake Bay, that a decision was made to go for the Sixth." *Ibid.*[1]

Governor O'Malley, time and again, confirmed that the State's express goal in redistricting was to flip the Sixth District. He and others in the party leadership wanted to "re[draw] the lines" of the Sixth District to "put more Democrats and Independents into the Sixth District" and ensure "the election of another Democrat" in Maryland's congressional delegation. 1JA44. Thus, Governor O'Malley acknowledged that, in addition to complying with the one-person-one-vote principle and the non-retrogression rule of Section 2 of the Voting Rights Act, "it was also my intent to * * * create a district where the people would be more likely to elect a Democrat than a Republican, yes, this was clearly my intent." 1JA79-80. Accord 1JA57, 78-79. And he expressly confirmed that, to flip the Sixth District to Democratic control, the mapdrawers "look[ed] at voting

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[1] Hawkins and the Maryland staffers with whom he collaborated also considered an "8-0 map," but this proved infeasible given concern for protecting incumbent Democrats (1JA104) and the preference not to cross the Chesapeake Bay (4JA913, 916).

histories in addition to voting registration—party affiliation." 1JA69.

The goal of "pick[ing] up a seventh seat * * * by targeting Roscoe Bartlett" (1JA232) was confirmed repeatedly by numerous other individuals. Delegate Curt Anderson, for example, explained in a press interview that "currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one." 3JA664 (¶47). Attorney General Douglas Gansler acknowledged that the goal was "to make it 7 to 1" (3JA752), as did Congresswoman Donna Edwards, who confirmed the goal "of drawing a seventh district for Democrats" (3JA662 (¶41)). And state officials repeatedly referred to the map as a "7-1 plan." See, *e.g.*, 3JA823 (email to Jason Gleason stating that Hawkins "worked out a new version of the 7-1 plan") . See also generally 3JA661-65 (¶¶40-51).

3. a. ***Burden.*** Given the relatively modest population growth in the district over the prior decade, only slight alterations to the Sixth District's lines were necessary to comply with the one-person-one-vote mandate. The Sixth District "could have reasonably been immune to substantial changes" after the 2010 census because the district "was located in the northwest corner of the state and needed only to shed 10,189 total population." 3JA767.

But to achieve the goal of ensuring that the Republican majority in the Sixth District would not be able to reelect Congressman Bartlett, the mapdrawers changed the district's boundaries so that they extended to the south, deep into Montgomery County, a Democratic stronghold. 1JA106-07.

In doing so, the map moved over 360,000 citizens out of—and around 350,000 citizens into—the district,

shuffling nearly half of its population. 3JA772-73. The plan removed all areas of Harford, Baltimore, and Carroll counties that had been in the Sixth District. 3JA801-02. In Frederick County, the plan removed all but the Democratic-leaning areas of the City of Frederick, southern areas of the county, and a narrow geographic connector to the Sixth District (3JA774-75, 784), splitting the county between two congressional districts for the first time since 1840 (1JA181-82).

These targeted subtractions and additions to the district diluted Republican votes very efficiently, putting Republicans at a manifest electoral disadvantage. "In the course of redrawing the district, 66,417 registered Republicans were removed from the district and 24,460 registered Democrats were added to the district." 3JA767. Also added to the Sixth District were 7,643 registered independent voters. 3JA766. This "massive interchange of territory" upended the political complexion of the district. 3JA808 (¶140).

The district's political complexion was thus almost perfectly inverted (3JA656 (¶10); 3JA666 (¶53)):

	Pre-gerrymander, Oct. 17, 2010		Post-gerrymander, Oct. 21, 2012	
Reg'd Rep.	208,024	46.7%	145,620	33.3%
Reg'd Dem.	159,715	35.8%	192,820	44.1%
Difference	+48,309	+10.9%	-47,200	-10.8%

b. The result was a legally cognizable dilution of Republican votes. 3JA764-66. Using an analysis drawn from Section 2 vote dilution cases, our redistricting expert, Dr. Michael McDonald, concluded that registered Republican voters are politically cohesive and

that both Republicans and Democrats engage in bloc voting. See 3JA764, 767-70.

Dr. McDonald's findings of political cohesion and bloc voting were corroborated by pre- and post-gerrymander election returns, which reflect votes cast by all voters, including independents. The data show, in particular (5JA1188, 1209-10 (¶¶13-15)):

Precincts that were ↓	Vote share for Republican congressional candidate as percentage of election-day votes				
	2008	2010	2012	2014	2016
retained	53.7%	57.8%	47.8%	59.5%	51.9%
removed	61.6%	65.7%	64.2%	71.5%	69.3%
added	28.7%	34.7%	30.3%	37.1%	32.1%

Because Republican voters—those who, irrespective of their formal party registrations, generally cast their votes for Republican candidates—are sufficiently numerous and geographically compact to form the majority of a reasonably drawn district in northwest Maryland (3JA655 (¶8), 4JA949-56), these findings were "incontrovertible" evidence that the lines of the new Sixth District "diminish[ed] the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district." 3JA764. Accord 3JA766-70.

The State's principal expert, history professor Allan Lichtman, agreed: "[T]he 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6 as compared to the prior redistricting plan." 3JA827. Indeed, Dr. Lichtman described the degradation of Republican political opportunity as "obvious." 1JA255-56.

As further evidence of vote dilution, Dr. McDonald produced (3JA786-87) an alternative map under which plaintiffs' votes would have carried more weight. See also 3JA776. The map altered only the 2011 line between the Sixth and Eighth Districts, thus preserving the political judgments reflected in the shape of every other district in the State, including the decision to prevent the First District from crossing the Chesapeake Bay.

c. The practical consequences of this vote dilution were just as the mapdrawers intended. Whereas Congressman Bartlett had consistently won reelection in the Sixth District by double-digit margins over the past two decades (3JA655 (¶8)), Democrat John Delaney defeated him by a 20.9% margin in 2012 (3JA666 (¶54)). Delaney won re-election in 2014 (3JA666 (¶55)), even as the 2014 "elections saw sweeping gains by the Republican Party in the Senate, House, and in numerous gubernatorial, state, and local races" throughout the rest of the Nation (3JA878). He won again handily in 2016, with a 14.4% margin. 3JA666 (¶56). Delaney did not run for reelection in 2018, but his Democratic successor, David Trone, won that year with a 21% margin. See Amicus Br. of David Trone 1.

This was, of course, just what the mapdrawers' metrics predicted would happen. Both the DPI and the highly regarded Cook PVI (1JA259) showed that, because of the huge shift in the district's population from mostly Republican voters to mostly Democratic voters, the chances of a Republican victory in the district dropped from 99.7%-100% in 2010 to just 6%-7.5% in 2012. JS App. 24a-26a. According to the *Cook Political Report*, this was the single "most dramatic alteration[]" in a district's political complexion in 2011 anywhere in the Nation. 4JA885-88.

d. The evidence also demonstrates indisputable associational harms inflicted on plaintiffs (several of whom are party and former campaign officials) and on Republican voters in the area more generally.

Republican engagement in congressional politics has been depressed in counties comprising the old Sixth District. As plaintiff Sharon Strine explained, when she went canvassing in support of Republican candidates, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time. * * * [T]hey just feel disenfranchised that they can't, they don't have somebody that represents them anymore." 1JA306-07. Plaintiff Alonnie Ropp shared a similar view: Voters in the former Sixth District stopped voting after the redistricting because "they were confused about the candidates." 1JA328. "They didn't know who they should be engaging. It was a very confusing situation for them." *Ibid.*

Plaintiff Ned Cueman described the disruption of Republican-leaning communities as "a chop job." 2JA371. He explained that, after the gerrymander, "I have absolutely no connection with what is in this district except the portions of Frederick that were thrown in." *Ibid.*

These accounts are borne out by the data. To start, turnout for the Republican primary elections in midterm years—when congressional candidates are more likely to drive voters to the polls—has decreased dramatically since 2011, despite increased party registration. In Allegany County, for example, turnout for the 2010 Republican primary stood at 42.8%. 4JA1112. But turnout plummeted by more than a third, to 26.7%, in the 2014 Republican primary. 4JA1118. Participation in midterm Republican primaries dropped similarly throughout all five counties comprising the old Sixth District. 4JA1112, 1118-19. Turnout has also decreased

for midterm general elections. 4JA1060, 1067-73, 1079-83.[2]

Fundraising by the Republican Central Committees in the counties that remained entirely in the Sixth District has also fallen off since the gerrymander. According to State Board of Elections campaign finance filings, fundraising during midterm election years has fallen by more than 12%. 5JA1216. Fundraising during presidential election years has suffered as well, dropping by over 6%. *Ibid.*

4. ***Causation.*** The evidence confirms beyond doubt that the political complexion of the Sixth District would not have been completely reconfigured, and Republicans' associational activities would not have been so badly hindered, but for the lawmakers' intent to burden Republicans' representational rights.

Governor O'Malley was explicit that state officials' effort to change the outcome of future elections in the Sixth District was subordinated only to their concern for the one-person-one-vote doctrine and to avoid "discriminat[ing] in any way against underrepresented minority groups." 1JA54. The State has presented no evidence suggesting that compliance with the one-person-one-vote standard or Section 2 of the Voting Rights Act, taken alone, would have necessitated *any* dilution of Republican votes in the Sixth District, much less dilution so substantial as actually seen.

Nor does the record otherwise reveal any plausible alternative explanation for the reconfiguration of the Sixth District. State officials have on occasion cited the

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[2] The State notes (Br. 17) that Republican registration increased in the district after the gerrymander. The same sources (1JA1054) show that Democratic registration increased at a greater pace. And there is no dispute that Republican *turnout* for midterm elections decreased. 4JA1060, 1067-73, 1079-83, 1112-19.

"I-270 corridor" as a "community of interest" as one rationale for the shape of the Sixth District. See, *e.g.*, 3JA707-08, 710. Yet none of those involved in the redistricting testified that they considered the I-270 corridor when drafting or evaluating the map. When asked whether he had considered "a community of interest related to the I-270 corridor when analyzing potential maps in the 2011 Maryland congressional redistricting process," Eric Hawkins replied, "No." 1JA137. When asked whether he had "at all consider[ed] commuting patterns on I-270 when [he] voted on the proposed congressional map," House Speaker Busch, who was on the GRAC and closely involved in the redistricting process, likewise responded "No. It never—never crossed my mind." 1JA245.

For her part, GRAC chair Jeanne Hitchcock confirmed that she was not provided with, and did not request, any information concerning the I-270 corridor during the redistricting process. 1JA165-66. So did Senate President Miller (1JA196), and Senate Majority Leader Garagiola (1JA239).

To be sure, testimony at the public hearings by Democratic party insiders appeared to promote the idea of migration along the "I-270 corridor." *E.g.*, 2JA418-20 (testimony of Sue Hecht, former Democratic house delegate); 2JA403-05 (testimony of Bob Kresslein, Maryland Democratic Party Treasurer). But because the GRAC was not itself drafting the map, there is no evidence that these public comments were actually taken into account by the mapdrawers. Ms. Hitchcock, for example, could not recall "any alterations that were made to the draft congressional maps * * * based on any testimony that was given at any of the GRAC hearings" concerning the I-270 corridor. Dkt. 177-8, at 123:16-20.

None of this is surprising, because the I-270 story is simply implausible. See 3JA805-09 (expert report of Dr. Peter Morrison).

B. Procedural background

1. Initial proceedings, the first appeal, and the amended complaint

Three *pro se* plaintiffs filed suit, challenging the 2011 gerrymander as (among other things) a violation of their First Amendment rights. Dkt. 11 ¶¶2, 23.

The district court dismissed without calling for a three-judge court. *Benisek* v. *Mack*, 11 F. Supp. 3d 516 (D. Md. 2014). The Fourth Circuit affirmed. *Benisek* v. *Mack*, 584 F. App'x 140 (4th Cir. 2014). This Court granted certiorari and reversed. *Shapiro* v. *McManus*, 136 S. Ct. 450 (2015).

On remand, plaintiffs "promptly filed a second amended complaint in February 2016," about "one week after [the] three-judge court was empaneled." JS App. 29a. "The amended complaint added six additional plaintiffs and refined the [First Amendment] theory underlying their constitutional challenge." *Ibid.*

Plaintiffs alleged that:

- those responsible for the redistricting expressly considered citizens' voting histories and political party affiliations (*e.g.*, 3JA624, 629, 642 (¶¶38, 59, 101)), with a specific intent to disadvantage those voters in future elections because of their past support for Republican candidates (*e.g.*, 3JA624, 640-41 (¶¶38, 93, 95-97));
- the 2011 redistricting plan burdened Republican voters in the Sixth District by (a) diluting their votes so effectively that it prevented them from reelecting a Republican representative (3JA624, 638 (¶¶38, 85-87)); and (b) "chill[ing] and manip-

ulat[ing] political participation" in the district, including by making citizens less likely to vote and "less likely to participate actively in campaigning" (3JA645-46 (¶¶112-19)); and

- the State would not have drawn the map as it did without consideration of voting history and party affiliation (3JA646-48 (¶¶120-28)).

2. The denial of the motion to dismiss

The district court denied the State's motion to dismiss. JS App. 172a-25a. "[W]hen a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens," the majority explained, "the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them." *Id.* at 195a. "The practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right." *Id.* at 196a.

Observing that "there is no redistricting exception" to the First Amendment's protections, the majority concluded that a gerrymander plaintiff "must allege that those responsible for the map redrew the lines of his district with the specific intent to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." JS App. 198a-99a (emphasis omitted). Such a plaintiff must also prove a concrete harm and causation. *Id.* at 199a-202a.

Judge Bredar dissented. JS App. 206a-25a. He concluded that harm based on vote dilution is nonjusticiable (*id.* at 210a, 225a) but recognized that "[t]here may yet come a day when federal courts, finally armed

with a reliable standard, are equipped to adjudicate political gerrymandering claims." *Id.* at 224a.

3. The denial of preliminary relief and the second appeal

Following lengthy discovery, plaintiffs moved for a preliminary injunction and in the alternative for summary judgment. JS App. 30a. The State filed an opposition to the motion for a preliminary injunction and alternatively cross-moved for summary judgment. *Ibid.* The State did not argue, however, that there were any factual disputes necessitating a trial (Dkt. 186-1), and it disavowed the need for an evidentiary hearing on the preliminary injunction motion (Dkt. 180, at 6).

The district court denied a preliminary injunction and stayed the proceedings. JS App. 82a-119a. Judge Niemeyer dissented. *Id.* at 119a-71a.

This Court affirmed. *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (per curiam).

4. The unanimous entry of final judgment for plaintiffs

a. The parties subsequently filed a joint status report in which the State reaffirmed that "this matter is appropriate for resolution on summary judgment" without need for a trial. Dkt. 209, at 3.

The parties filed supplemental summary judgment briefs addressing the Court's decisions in this case and *Gill* v. *Whitford*, 138 S. Ct. 1916 (2018). Our brief reiterated that plaintiffs had suffered vote dilution. Dkt. 210, at 5-15. It also stressed that Republican voters' associational activities had been chilled and disrupted by the gerrymander, including through depress-

ed voter interest, lower turnout, and reduced fundraising. *Id.* at 15-18.[3]

In support of the second point, we attached voting data and campaign finance reports publicly available on the State's own website, together with an affidavit that included basic arithmetic. 5JA1206-16.

The State did not offer additional data (then, or at any later time), nor did it ever purport to identify any genuine disputes of material fact. Instead, it moved two months later to strike the affidavit attached to our supplemental brief. 5JA1249-50. The district court denied the motion. 5JA1251-52.

b. On November 7, 2018—the day after the 2018 congressional elections—the three-judge court unanimously granted final judgment to plaintiffs and enjoined the State from using the 2011 redistricting map in future elections. JS App. 1a-77a.

Judge Niemeyer's lead opinion for the court, joined in by Judge Russell, held first that plaintiffs have standing. JS App. 43a-47a. "The plaintiffs in this case, unlike the plaintiffs in *Gill* have brought and pursued the kind of single-district challenge that *Gill* recognized as providing * * * standing." *Id.* at 47a.

"Turning to the merits," the court ruled that the "undisputed facts" in the record "establish[] each element of [plaintiffs'] First Amendment claim that their representational rights have been impermissibly burdened by reason of their political views and voting history." JS App. 48a.

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[3] The State incorrectly calls this second point a "new claim." Br. 22. The second amended complaint alleged associational burdens (3JA645-46 (¶¶112-19)), and our opposition to the motion to dismiss defended on that ground (Dkt. 68, at 31-32). Our summary judgment brief likewise pointed to evidence that political engagement had been "chilled and disrupted." Dkt. 177-1, at 18-19.

> ***First***, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish Maryland's congressional district boundaries in 2011 with a narrow focus on diluting the votes of Republicans in the Sixth Congressional District in an attempt to ensure the election of an additional Democratic representative in the State's [eight-member] congressional delegation.

JS App. 48a. (boldface added). Indeed, "the record is replete with direct evidence of this precise purpose." *Id.* at 49a.

The court rejected the State's argument that an intent to help Democrats is not the same as an intent to harm Republicans: "If the government uses partisan registration and voting data purposefully to draw a district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party." JS App. 50a.

The court also rejected the State's argument that the First Amendment requires proof that lawmakers "target[ed] *specific* voters based on their individual party affiliation or voting history." JS App. 51a. "The fact that the State intentionally moved Republican voters out of the Sixth District en masse, based on precinct-level data, and did not examine each individual voter's history does not make its action permissible under the First Amendment." *Ibid.*

> ***Second***, with respect to the injury element, the plaintiffs have shown that the redrawn Sixth District did, in fact, meaningfully burden their representational rights.

JS App. 52a (boldface added). On this point, the court concluded that "plaintiffs must have experienced a

'demonstrable and concrete adverse effect' on their right to have 'an equally effective voice in the election' of a representative, which they can establish by showing that they have been placed at a concrete electoral disadvantage." *Ibid.* And "[t]he plaintiffs here have made that showing" with evidence of vote dilution confirmed by both parties' experts. *Id.* at 53a.

Drawing on Justice Kagan's concurring opinion in *Gill*, the court held further that "plaintiffs can prove injury in the form of associational harm, as 'distinct from vote dilution,' by showing that the State has 'burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objectives.'" JS App. 58a (quoting 138 S. Ct. at 1938-39).

Here too, the court held, "the plaintiffs have shown that the 2011 redistricting plan did indeed burden their associational rights," in several ways. JS App. 61a. For example, "voter engagement in support of the Republican Party dropped significantly" following the gerrymander. *Id.* at 62a. Testimony thus "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters," making it more difficult for plaintiffs and other Republicans "to 'band together in promoting among the electorate candidates who espouse their political views.'" *Ibid.* In addition, there was undisputed evidence "that fundraising by the Republican Central Committees of the counties that remained entirely within the Sixth District after the 2011 redistricting dropped off after the redistricting in both midterm and presidential elections." *Id.* at 63a.

> ***Finally***, as to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries

> would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent.

JS App. 54a (boldface added). And it was the same "reshuffling that caused the associational harms noted." *Id.* at 63a-64a.

Having held that the undisputed record evidence established a First Amendment violation, the court addressed the standard for entering a permanent injunction. On this score, the court emphasized that plaintiffs' request for permanent injunctive relief dates to the original complaint, filed in 2013. JS App. 66a. "While it is true that the case has dragged on" in the interim, the court found that the "protraction cannot be attributed to the plaintiffs, but to process." *Ibid.* The court thus held that both plaintiffs and defendants had been diligent in their litigation of the case. *Ibid.*

Concluding that the "balance of the equities" and the "public interest" both favor a permanent injunction (JS App. 64a-67a), the court enjoined the State from using the 2011 redistricting map in future elections and ordered the preparation of a new map.

c. Chief Judge Bredar concurred in the judgment in an opinion also joined by Judge Russell. JS App. 67a-76a. "Regardless of whether the State succeeded in its obvious intent to increase the likelihood that a Democrat would win," he reasoned, "the State certainly caused harm" by breaking apart Republican communities of interest and inhibiting their associations. *Id.* at 72a.

d. The State moved for a discretionary stay of the injunction. Dkt. 226. Plaintiffs consented on condition that (1) the parties brief jurisdiction before this Court on an expedited schedule, and (2) the State stipulate that there will be sufficient time to draw a new map

before the 2020 elections following a decision by this Court by June 2019. 5JA1347-49.

SUMMARY OF ARGUMENT

I. Government regulation may not favor one citizen over another on the basis of his or her political views. Thus, the government offends the First Amendment when it imposes burdens on certain groups of citizens based on the content of their expression.

That is exactly what a partisan gerrymander does: It inflicts concrete burdens (vote dilution and associational disruptions) on a particular group of citizens because government officials disapprove of those citizens' voting histories and political-party affiliations. That is a violation of the First Amendment.

Gerrymander plaintiffs are entitled to relief under the First Amendment when they prove that mapdrawers deliberately diluted their votes or disrupted their associational activities because of their political views, producing a discernable, concrete injury.

II. Plaintiffs' First Amendment claim is justiciable. Although suits challenging partisan gerrymanders are likely to have political consequences, that alone does not make them nonjusticiable "political questions." The question is whether there are principled and manageable standards for decision; if there are, the courts must hear the case.

The First Amendment rubric offers manageable standards for judging partisan gerrymanders. Inquiry into legislative intent, even when intent does not appear on the face of the challenged law, is a familiar exercise for federal courts. This case confirms that the inquiry is manageable.

The burden prong of the First Amendment framework is equally manageable. The inquiry asks whether

the gerrymander imposed a discernable and concrete burden on the targeted voters. The gerrymander here at issue did so in two ways: First, it diluted plaintiffs' votes, so much so that they and others who share their views have been unable to elect a representative of their choice. Second, it has manifestly burdened their associational activities, including by demonstrably depressing voter interest in congressional politics. Judicial analysis of these burdens mirrors the analysis undertaken in other constitutional contexts, including the Court's ballot-access cases.

III. Application of the First Amendment in this context does not mean extirpating politics from redistricting. Mapdrawers are free to continue using political data in pursuit of balanced and competitive maps and to undo past partisan gerrymanders. And the First Amendment does not impugn the wide range of very important political considerations in redistricting that do not entail targeting particular groups of citizens on the basis of their political views.

IV. The district court properly entered final judgment and a permanent injunction for plaintiffs. To begin with, the State waived any argument that there were genuine disputes warranting a trial. Indeed, its conduct below may be best understood as having submitted the case to the district court for judgment on the papers.

Regardless, the State has not identified any genuine disputes of material fact. The evidence concerning intent was entirely one-sided; no rational finder of fact could have ruled in the State's favor. The same goes for associational burdens.

The State's evidentiary objections are meritless. The proffered testimony was not hearsay, and there was nothing problematic in the denial of those objec-

tions *sub silentio*. The campaign finance reports also were plainly admissible.

Finally, the district court acted well within its discretion to enter a permanent injunction. It correctly concluded that both sides litigated the case diligently. This Court's affirmance of the district court's denial of preliminary relief for the 2018 election did not constrain that court's discretion to enter a permanent injunction for plaintiffs.

ARGUMENT

After nearly five years of hard-fought litigation, the district court entered a unanimous final judgment in favor of plaintiffs, enjoining enforcement of Maryland's unlawful 2011 political gerrymander of its Sixth Congressional District.

The standards adopted and applied by the district court, grounded in settled First Amendment doctrine, are readily justiciable. And plaintiffs' entitlement to relief under those standards is beyond dispute. The Court accordingly should affirm.

I. PARTISAN GERRYMANDERING VIOLATES THE FIRST AMENDMENT

A. States may not burden their citizens for expressing disfavored political beliefs

It is a foundational First Amendment rule that States may not deny benefits to, or impose burdens on, citizens because of their political views. "[G]overnment regulation may not favor one speaker over another," and "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Thus, "the government offends the First Amendment when it imposes," for example, "financial burdens on certain speakers based on the

content of their expression." *Ibid.* (citing *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

This essential rule is not context-dependent. It applies to public employment decisions (*O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996)), government contracts (*Board of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996)), state grant support (*Rosenberger*, 515 U.S. at 827-31), and prisoner benefits (*Ortiz* v. *Jordan*, 562 U.S. 180 (2011)). In these cases and many others, the First Amendment prohibits a State from subjecting individuals to disfavored treatment on the basis of their views.

When a State imposes a burden on individuals because of their *past* expression—as opposed to regulating expression prospectively—this Court's cases often describe the violation as "retaliation." *E.g.*, *Lozman* v. *Riviera Beach*, 138 S. Ct. 1945, 1949 (2018); *Crawford-El* v. *Britton*, 523 U.S. 574, 592 (1998) (similar). But elsewhere—including in the context of political patronage—the Court has used the same analytical framework without invoking the label "retaliation." See *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti* v. *Fenkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality).

Thus, the central question in a First Amendment challenge to partisan gerrymandering is not whether lawmakers acted with vengeance or "malicious retribution" per se (State Br. 45); rather, it is whether they have burdened a particular group of voters "*because of* [those voters'] political association, participation in the electoral process, voting history, or expression of political views." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (emphasis added). No more, no less.

The focus is process-based. A state official may fire a subordinate, a police officer may arrest a pedestrian, and a prison guard may deny a prisoner some privilege for a wide range of permissible reasons. But even though the government may deny a benefit or impose a burden "for any number of reasons, there are some reasons upon which the government may not rely." *Branti*, 445 U.S. at 514-15 (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). Among those is an intent to burden individuals because of their points of view, "[f]or if the government could" impose a burden on or "deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized." *Ibid.* (quoting same).

B. Partisan gerrymandering violates these basic First Amendment principles

1. This First Amendment framework is an appropriate fit to the constitutional violation in this case. Partisan gerrymandering is the infliction of concrete burdens (vote dilution and associational harms) on a particular group of citizens because of official disapproval of the views expressed by those citizens at the ballot box and in their association with a particular political party.

"Political belief and association constitute the core of those activities protected by the First Amendment." *Rutan*, 497 U.S. at 69 (quoting *Elrod*, 427 U.S. at 356 (plurality)). Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968).

Casting a ballot for one candidate or another is perhaps the most fundamental expression of a citizen's political beliefs. "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty'" protected by the Constitution. *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 214 (1986). And "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Ibid.* Among the "broad spectrum of roles in [a political party]'s activities" is "casting [one's] votes for some or all of the Party's candidates." *Id.* at 215.

It follows that a burden deliberately imposed upon particular citizens because of the views reflected in their prior votes and party affiliations is a burden upon protected speech.

"[T]here is no redistricting exception to [the] well-established * * * [and] fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights." JS App. 198a. Because there is a "right of qualified voters, regardless of their political persuasion, to cast their votes effectively" (*Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)), "significant First Amendment concerns arise when a State purposely subjects a group of voters or their party to disfavored treatment" in redistricting. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

Applied in this context, the First Amendment framework asks three questions:

1. Did the State consider citizens' protected First Amendment conduct with an intent to burden those citizens because of their political beliefs?
2. If so, did the redistricting map, in fact, dilute the votes of the targeted citizens or disrupt

their political association in a discernable and concrete way?

3. If so, is there a constitutionally acceptable explanation for the map's ill effects, independent of the intent to discriminate on the basis of political belief?

It makes no difference that the drawing of congressional districts is a political function committed by the Constitution to the States. See U.S. Const. art. I, § 4. In redistricting, as in any other context, "a denial of constitutionally protected rights demands judicial protection." *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). States can no more violate the First Amendment when engaging in redistricting than they may violate the Fourteenth Amendment.

2. The State responds (Br. 45) that application of the First Amendment turns on a "legal fiction" that "unfairly treats each political party's natural inclination to serve its members' interests as if it were the equivalent of malicious retribution against members of a competing party." The State implies that recognition of the First Amendment's role in this context would mean that legislators in the majority violate the Constitution every time they enact a law that advantages them politically at the cost of the minority.

That misconstrues our theory, which is that lawmakers may not target particular groups of private citizens for disfavored treatment on the basis of those citizens' political views, including past voting history. This has nothing to do with lawmakers' advancing policies of general application that they and their supporters prefer but their political opponents do not. Such legislative actions involve eminently permissible differences of opinion concerning public policy—not discrimination against particular *groups of voters*

based on official disapproval of those voters' expressive conduct. The gerrymander in this case involved such discrimination, and thus constituted unlawful "government regulation * * * favor[ing] one speaker over another." *Rosenberger*, 515 U.S. at 828.

II. PLAINTIFFS' FIRST AMENDMENT CLAIM IS JUSTICIABLE

The State has never expressly disagreed with the basic principles underlying plaintiffs' First Amendment claim. It has never asserted a right to use redistricting to burden voters by reason of their political views. Indeed, the State now acknowledges (Br. 31-32) that "excessive partisanship in creating a districting plan is impermissible" and agrees (*ibid.*) that "[t]his Court can and should determine a manageable standard * * * to remedy partisan gerrymanders."

Thus, the State's principal bid for reversal hinges on its claim that plaintiffs' First Amendment claim is nonjusticiable. This Court's cases show otherwise.

A. Political consequences do not make for "political questions"

1. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky* v. *Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821)). Deciding whether official governmental conduct "exceeds whatever authority has been committed" to the officials undertaking it is "a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). The Court "cannot shirk this responsibility merely because" the case is difficult or its "decision may have significant political overtones." *Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)

Put another way, the doctrine "is one of 'political questions,' not one of 'political cases.'" *Davis* v. *Bandemer*, 478 U.S. 109, 122 (1986). "[C]ourts cannot reject as 'no law suit' a bona fide controversy as to whether some action * * * exceeds constitutional authority" simply because the action is "denominated 'political.'" *Ibid.*

2. The concept of justiciability "expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of [Article] III." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). Among those limitations is the "narrow" political-question doctrine (*Zivotofsky*, 566 U.S. at 195), which, as relevant here, requires that courts have principled and rational standards of decision. "[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). "A lack of judicially discoverable and manageable standards for resolving" a controversy indicates a commitment of the issue to the political branches. *Zivotofsky*, 566 U.S. at 195.

The doctrine sets a high bar on this score. It does not ask whether the case presented is merely a difficult one; rather, the question is whether the issue put to the court entirely "defies judicial treatment" (*Baker*, 369 U.S. at 212), such that it cannot be described as "legal in nature" at all (*Japan Whaling*, 478 U.S. at 230). And when familiar constitutional principles and manageable legal standards are available for the adjudication of a true case or controversy, "a federal court's obligation to hear and decide [the] case is virtually unflagging." *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013).

B. The First Amendment framework offers manageable standards for judging partisan gerrymanders

The First Amendment provides a time-tested set of rules that ask familiar, objective questions answerable with traditional evidence under ordinary legal standards.

1. The intent prong is justiciable and satisfied in this case

a. The question of "governmental purpose is a key element of a good deal of constitutional doctrine," including under the Equal Protection Clause, Commerce Clause, and Establishment Clause. *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 861 (2005). In such cases, the Court has repeatedly rejected the notion "that official purpose is unknowable." *Id.* at 859.

The State nevertheless implies (Br. 46-47) that discovery of legislative intent is unworkable because the relevant doctrine "emerged from, and is designed to work in, the context of government acting in its *executive* capacity," which differs from the legislative capacity because legislating "always involves consideration of speech and, typically, political speech." That is both wrong and irrelevant.

It is wrong because this Court has applied the First Amendment framework, not only to executive officials, but also to multi-member political bodies similar to legislatures. Indeed, some of this Court's most important retaliation cases involved claims against multi-member school boards. See *Mt. Healthy City Sch. Dist. Bocard of Educ.* v. *Doyle*, 429 U.S. 274 (1977); *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968). The Court has not found anything unworkable about discerning official intent in such cases.

It is irrelevant because, although the legislative process typically involves legislators' "consideration" of their colleagues' "speech" and "political affiliation" (Br. 47), the framework here is not concerned with legislators reacting to one another in the daily tit-for-tat of capital-city politics. The question is whether the challenged law reflects official disapproval of the protected conduct of a particular, targeted group of private citizens. Judicial analysis of pin-point intent of that sort is precise and limited; it would not capture ordinary interactions among legislators.

At argument last Term—and in a footnote buried in its present brief (at 50 n.16)—the State suggests that discriminatory legislative intent cannot be discerned unless it is "on [the] face" of the statute. But the Court evaluates non-facial legislative intent all the time, as it does in the racial gerrymandering context. *E.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1463 (2017); *Shaw* v. *Reno*, 509 U.S. 630, 646-47 (1993).

In other First Amendment contexts, too, this Court has "recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 645 (1994). Accord, *e.g.*, *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).[4]

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[4] *United States* v. *O'Brien*, 391 U.S. 367 (1968), is not to the contrary. The Court there upheld the challenged law because the conduct at issue was not protected by the First Amendment, and the law was appropriately tailored to a "substantial [governmental] purpose" regardless. *Id.* at 377-78. Although the Court suggested "an alleged illicit legislative motive" cannot alone invalidate a statute (*id.* at 383), a law with an "unconstitutional effect" rightly would be struck down (*id.* at 385). The Court used as a telling example "the redrawing of municipal boundaries * * * to deprive" particular citizens "of their right to vote." *Ibid.*

b. We proved beyond all doubt a specific intent to burden Republican voters according to established judicial standards. See pages 6-8, *supra*; JS App. 48a-51a. Democratic officials in 2011 disapproved of citizens' successful support of Roscoe Bartlett and set out to dilute Republican votes and disrupt Republican organization to prevent his reelection, ensuring a 7-1 map. *Ibid.*

The State's effort (Br. 48-49) to cleanse the gerrymander of the legislature's unconstitutional intent with the 2012 referendum is not persuasive.

The constitutional violation in this case was complete at the time the State enacted the map. That the public later rejected a referendum challenging that action has no bearing on the unlawfulness of the original action. It would not cure an Equal Protection violation to ratify a racial gerrymander in a statewide referendum; nor can it cure a First Amendment violation to do so. A State's infringement of the First Amendment is not made acceptable simply because a majority of the public thinks it is good policy.

Even if that were incorrect, the referendum would not have sanitized the 2011 gerrymander. The ballot question was opaque, appearing on the 2012 ballot as follows:

QUESTION 5
Referendum Petition
(Ch. 1 of the 2011 Special Session)
Congressional Districting Plan

Establishes the Boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.

_____ For the referred law

_____ Against the referred law

See Opinion 4, *Parrott* v. *McDonough*, No. 1445, Sept. Term, 2012 (Md. Ct. Spec. App. Jul. 23, 2014). This language was so diversionary that not even the State's own redistricting expert, Dr. Lichtman, could explain what it meant. In his view, "[i]t means constitutionally when you do a redistricting you base it on the most recent census figures" and "[no]thing more than that." Dkt. 177-49, at 174:22-175:10.

The State notes (Br. 15) that the Maryland appellate court "rejected contentions that the ballot language was misleading or insufficiently informative." But if it were relevant, the issue would not be whether the ballot language was sufficient as a legal matter. It would be whether, as a factual matter, voters *actually* understood what they were being asked to approve. On that score, Dr. Lichtman's testimony says it all.

2. The burden prong is justiciable and satisfied in this case

The State also asserts that the burden element is not judicially manageable. But the burdens at issue here are practical and functional and can be evaluated in ways readily familiar to courts.

a. Vote dilution and its practical consequences

Vote dilution is undeniably a justiciable harm. See *Gill*, 138 S. Ct. at 1921; *Cooper*, 137 S. Ct. at 1470. It is caused "either 'by the dispersal of [disfavored voters] into districts in which they constitute an ineffective minority'" or by "concentrat[ing disfavored voters] into districts where they constitute an excessive majority.'" *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburgh* v. *Gingles*, 478 U.S. 30, 46 n.11 (1986)).

i. One straightforward way to judge vote dilution stems from the racial vote dilution cases under Section

2 of the Voting Rights Act, where the governing standards are well established. To show that vote dilution has "impeded the ability of minority voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 51), a Section 2 plaintiff must satisfy the three *Gingles* preconditions:

- *first*, the targeted voters must be sufficiently numerous and "geographically compact to constitute a majority in some reasonably configured legislative district";
- *second*, "the minority group must be politically cohesive"; and
- *third*, the majority "must vote sufficiently as a bloc to usually defeat the minority's preferred candidate."

Cooper, 137 S. Ct. at 1470.

If the targeted group is not "able to demonstrate that it is sufficiently large and geographically compact to constitute a majority" in a reasonably-drawn district, then the drawing of the district's lines "cannot be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50. If the targeted group cannot "show that it is politically cohesive," then "it cannot be said that the [redistricting] thwarts [its] interests." *Id.* at 51. And if the majority does not "vote[] sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate," then cracking the minority group will not "impede[] its ability to elect its chosen representatives." *Ibid.* (citations omitted).

When these three conditions are satisfied, however, it follows that there has been a denial of "equal electoral opportunity" as a result of the lines that the legislature drew. *Johnson* v. *De Grandy*, 512 U.S. 997, 1012 (1994). *Gingles* and its progeny are proof positive that

vote dilution—the principal burden relied upon by the district court below—is a justiciable question.[5]

ii. What vote dilution ultimately reflects is a burden upon electoral opportunity. JS App. 23a-26a, 195a. The Court has recognized in a variety of contexts that such burdens are justiciable.

In *Anderson*, for example, the Court confronted an early candidacy deadline that applied only to independent candidates. Invalidating that discriminatory regulation under the First Amendment, the Court explained that "'the right of qualified voters, regardless of their political persuasion, to cast their votes effectively'" can be "heavily burdened" by voting "restrictions" and "regulation[s]." 460 U.S. at 787-88.

Courts faced with First Amendment challenges to such regulations must evaluate the burdens imposed using "an analytical process that parallels [their] work in ordinary litigation." *Anderson*, 460 U.S. at 789. This requires consideration of "character and magnitude of the asserted injury" measured against "the precise interests put forward by the State as justifications for the burden imposed." *Ibid.*

The Court ultimately invalidated the early deadline in *Anderson* because it selectively "place[d] a particular burden on an identifiable segment of Ohio's independent-minded voters." 460 U.S. at 792. Because

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[5] *Johnson* held that the *Gingles* preconditions by themselves are not independently "sufficient" to prove a Section 2 claim. 512 U.S. at 1011. But *Johnson* was expressly framed as an interpretation of Section 2 of the VRA. And the Court has emphasized that its cases interpreting "the text of § 2" do "not apply to cases in which there is intentional discrimination." *Bartlett* v. *Strickland*, 556 U.S. 1, 19-20 (2009). We thus rely on the *Gingles* preconditions only as a commonsense guide for identifying burden in partisan gerrymandering cases involving *intentional* discrimination.

the deadline applied "unequally" among the political parties—making it easier as a practical matter for the two major parties to place candidates on the ballot—it "burden[ed] the availability of political opportunity" based on the "political preferences" of voters and was therefore unlawful. *Id.* at 793-94. Thus, it could not stand.

Similarly, in *Cook* v. *Gralike*, 531 U.S. 510 (2001), the Court invalidated a Missouri law that placed a notation next to each candidate's name on the ballot, relaying the candidate's position on term limits. *Id.* at 514-27. Although "the precise damage the labels may exact on candidates [was] disputed," the Court did not hesitate to invalidate the regulation because "the labels surely place their targets at a political disadvantage." *Id.* at 525.

Just as the Court could identify concrete burdens in *Anderson* and *Gralike*, similar kinds of burdens are apparent in partisan gerrymandering cases, rendering vote dilution a judicially identifiable injury addressable by First Amendment standards. Evaluating these burdens entails considering all the same factors that mapdrawers themselves consider: how the map has changed the distribution of voters throughout the region, how those voters typically have voted in past elections, and how those changes are likely to impact elections yet to come.

Plaintiffs would surely suffer a justiciable harm if the State's constitution required mapdrawers to ensure a delegation of seven Democrats and one Republican, and if, in turn, the mapdrawers complied and such a delegation were subsequently elected. See Tr. 45:10-48:5, *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333). That is equally so here, where ensuring a "7-1" delegation was an open and undeniable purpose of the statute enacted.

Pursuant to this First Amendment framework, the question is not whether some characteristic of the district is delineated "extreme" according to one particular statistical metric. Rather, it is simply whether the map's burdens have "ma[d]e some practical difference" for the targeted voters according to well-accepted, traditional First Amendment standards. JS App. 199a. Qualitative analysis of constitutional burdens like this is a mainstay of First Amendment doctrine. *E.g.*, *Rutan*, 497 U.S. at 73-76; *Anderson*, 460 U.S. at 787-89, 792; *Cook*, 531 U.S. at 525. It is assuredly manageable for courts.

This is especially so in view of the need to show specific intent. The practical *burdens* of partisan gerrymanders mirror the *goals* of those who engage in gerrymandering. Courts of course are capable of evaluating whether a state legislature has succeeded in converting a specific intent to impose a particular burden into to the practical circumstances necessary to bring that burden about.

iii. Using this "well developed and familiar" (*Baker*, 369 U.S. at 226) framework, we showed that the gerrymander concretely impeded the ability of plaintiffs and other Sixth-District Republicans to elect a representative of their choice. See pages 8-11, *supra*; JS App. 52a-53a. This self-evident fact was conceded as "obvious" by the State's own expert. 1JA255-56. See also 3JA827 (the gerrymander "improved Democratic prospects"). The vote dilution was so extreme that no Republican has won the district since 2010.

b. Associational burdens

i. "[P]artisan gerrymanders inflict other kinds of constitutional harm as well," including "infringement of [voters'] First Amendment right of association." *Gill*, 138 S. Ct. at 1934 (Kagan, J., concurring). Association-

al injuries dovetail with vote dilution but are "distinct from [it]." *Id.* at 1938. The idea is that "[b]y placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Ibid.*

For example, "[m]embers of the 'disfavored party' * * * deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). From this angle, the complaint "is that the gerrymander has burdened the ability of like-minded people * * * to affiliate in a political party and carry out that organization's activities and objects." *Id.* at 1939.

As the district court held, "the kinds of injury resulting from such associational violations are readily discernable and significant: 'Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.'" JS App. 57a (quoting *Anderson*, 460 U.S. at 792).

That was this Court's approach in both *Anderson* and *Clements* v. *Fashing*, 457 U.S. 957 (1982). In such ballot-access cases, "[t]he inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements*, 457 U.S. at 964. In particular, "classification schemes that impose burdens on new or small political parties or independent candidates" may violate "First Amendment interests in ensuring freedom of association" by concretely inhibiting individuals' "association with particular political parties." *Id.* at 964-65.

So too in *Anderson*: When, by operation of government regulation, "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign," a "burden [is] imposed on * * * associational rights." 460 U.S. at 791-92 & 12. Such regulations can impose justiciable burdens by (among other things) "making it virtually impossible for" candidates from disfavored parties to achieve electoral success as a practical matter. *Clements*, 457 U.S. at 965. That is exactly what partisan gerrymandering does.

Against this backdrop, Article III courts have well-accepted standards for evaluating the practical burdens imposed by partisan gerrymandering under the First Amendment—standards that both mirror those used in "ordinary litigation" under the First Amendment (*Anderson*, 460 U.S. at 789) and provide clear guidance to legislators who must conform their conduct to constitutional limitations.

ii. The State contends (Br. 35-36) that associational harms are incapable of assessment according to principled and manageable standards. The State's true position appears to be that any standard in this context must be reducible to a single, arithmetical bright line. But the Court did not require any such bright line in *Anderson*, *Gralike*, or *Clements*.

Under this Court's ordinary approach to constitutional adjudication, it is enough to say that the associational injuries in this case clearly pass muster, leaving to another day the possibility of recognizing others. Judging is a case-by-case endeavor, and the absence of a single, mechanical metric "hardly leaves courts at sea." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). The Court has never demanded a universal "'litmus test' that would neatly separate valid from invalid" burdens

as a precondition to the exercise of Article III jurisdiction. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality). It should not start here.

iii. The "undisputed evidence amply demonstrates that the plaintiffs' associational rights were burdened" by the gerrymander. JS App. 63a. "Members of the Republican Party in the Sixth District, deprived of their natural political strength by [the] partisan gerrymander, were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Ibid.* See also pages 12-13, *supra*; JS App. 74a (Bredar, C.J., concurring in judgment) ("[T]he 2011 redistricting foiled Republican organizational efforts.").

3. The causation prong is justiciable and satisfied in this case

The State has not argued that the causation prong is nonjusticiable. Nor could it, as courts routinely address whether unconstitutional factors are a but-for cause of official conduct. See *Mt. Healthy City Board of Educ.*, 429 U.S. at 285-87.

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A State may not intentionally "burden[] the availability of political opportunity" using discriminatory candidacy filing deadlines that depress associational activities (*Anderson*, 460 U.S. at 792); it may not "dictate electoral outcomes" using ballot notations that "place their targets at a political disadvantage" (*Cook*, 531 U.S. at 523-25); and it may not "deny a benefit to a person because of his constitutionally protected speech or associations" using patronage practices that favor the members of one political party over another (*Branti*, 445 U.S. at 515).

Neither may a State intentionally do those things by manipulating district lines. What is more, purpose

and burden have long been capable of rational judicial assessment in those varied contexts. They are equally so in this setting.

III. THE STATE'S OTHER OBJECTIONS ARE MISGUIDED

The State offers a potpourri of other arguments that bear on the merits rather than justiciability. They provide no basis for reversal.

A. The First Amendment does not ban politics in redistricting

The State objects (Br. 34-35) to application of the First Amendment framework because, in its view, the First Amendment would forbid "[a]ny degree of partisan intent and almost all political aims of any nature." See also State Br. 45-46. Not so.

1. Pursuing "political aims of any nature" in redistricting does not necessarily require discriminating against citizens because of their voting histories. In fact, this Court has recognized many other important "political considerations" in redistricting that do not. *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Virtually every one of them is permissible under the First Amendment.

The goal of "avoiding contests between incumbent Representatives" (*Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983)) entails drawing districts that do not pair two incumbents together into a single district. Such efforts do not run afoul of the First Amendment framework because they do not target voters on the basis of their political views. Yet the dominant party's efforts to avoid pitting its own incumbents against one another is assuredly a matter of obtaining partisan advantage in redistricting.

A mapdrawing effort to "keep [a] constituency intact so the officeholder is accountable for promises made or broken" (*LULAC* v. *Perry*, 548 U.S. 399, 441 (2006)) is also lawful under the First Amendment. It would not require the legislature to evaluate the political character of groups of citizens and attempt on that basis to make it more difficult for those citizens to elect their candidates of choice.

Similarly, decisions to "mak[e] districts compact" and "respect[] municipal boundaries" may reflect lawful political considerations rather than an intent to dilute votes for the opposition party (or to maintain such dilution). *Karcher*, 462 U.S. at 740.

Mapdrawers also often aim to ensure that institutions with special importance to an incumbent remain in the incumbent's district. These efforts (which are frequently responsible for some of the most awkwardly shaped districts) are designed to achieve partisan advantage. In this case, for example, the evidence shows that Fifth District incumbent Steny Hoyer, an alumnus of the University of Maryland, wanted College Park in his district. 3JA665 (¶50). The context suggests that this was to ensure that he would be able to raise funds more effectively from the school's leadership and alumni, as well as more easily bring federal benefits to his constituents there. Similarly, the evidence shows that Second District incumbent Dutch Ruppersberger, then a member of the House Intelligence Committee, wanted Fort Meade and Aberdeen Proving Ground in his district (*ibid.*) for similar reasons. These are permissible considerations.

We have repeatedly made these points before both the district court and this Court, but the State declines to acknowledge them, let alone respond.

2. Setting that aside, "[t]he inquiry is not whether political classifications were used," but "whether political classifications were used [with the purpose and effect of] burden[ing] a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring). Thus, the State may continue to use data concerning citizens' voting histories and party affiliations without violating the First Amendment if it does so (1) without an intent to burden supporters of the disfavored party or (2) in an appropriately tailored pursuit of a legitimate state interest.

The State's insistence (Br. 37) that the First Amendment would necessarily "invalidate state efforts to draw district lines to achieve proportional representation" is therefore mistaken. Although it is not a question presented here, a State's good faith effort "fairly to allocate political power to the parties in accordance with their voting strength" (*Gaffney*, 412 U.S. at 754) would be permissible—as would pursuit of competitive districts (*e.g.*, Ariz. Const. art. IV, pt. 2, § 1(14)(F)) and remediating past gerrymanders.

Recognizing as much does not require putting every redistricting map, individually, "through the strict scrutiny hoops." Tr. 18:18, *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333). It may instead entail establishing certain safe-harbors and allowing the lower courts to apply them categorically.

That has been this Court's approach in the patronage cases. It has recognized that discrimination in hiring on the basis of political views, while generally impermissible, is acceptable when filling "policymaking positions" (*Elrod*, 427 U.S. at 367 (plurality)), with respect to which "party affiliation is an appropriate requirement for the effective performance of the public office involved" (*Branti*, 445 U.S. at 518). Under this approach, the courts of appeals have recognized that

they "need only apply th[e] *Branti* test" and "do not have to apply strict scrutiny in each individual case." *McCloud* v. *Testa*, 97 F.3d 1536, 1543 (6th Cir. 1996). Accord, *e.g.*, *McEvoy* v. *Spencer*, 124 F.3d 92, 98 (2d Cir. 1997). A similar approach with respect to legislatures' pursuit of balanced maps or competitive districts may be appropriate in this context as well.

In all events, an affirmance would be consistent with *Gaffney*. Whatever the Court may have said there about proportional maps, it sharply distinguished permissible balancing from legislatures' use of redistricting to "minimize or eliminate the political strength of [a] group or party." 412 U.S. at 754. Indeed, according to *Gaffney*, a redistricting plan is constitutionally suspect if "political groups have been fenced out of the political process and their voting strength invidiously minimized." *Ibid.* That is this case.

B. The shape of the immediately prior district enjoys no special standing in the constitutional analysis

The State complains (Br. 39-40) that applying the First Amendment framework to partisan gerrymandering "necessarily hinges on the superior position [that] one party enjoyed under the prior map." As we have explained several times now (*e.g.*, 5JA1183-85; Mot. to Affirm 19, 24-25), that is wrong.

The inquiry that vote dilution poses is whether the disfavored party has been burdened vis-à-vis any reasonably drawn district in the area—not necessarily the immediately prior map. That is, the question is whether the supporters of the disfavored party are sufficiently numerous and geographically compact to form the political majority of a reasonably drawn district in the area (*Cooper*, 137 S. Ct. at 1470), and in turn whether the reason such a district was not drawn

was an intent to dilute their votes or disrupt their associations, so as to "impede the ability of [the disfavored] voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 48). Measured against this properly stated standard, the shape of the immediately prior district enjoys no special standing in the constitutional analysis.

To be sure, the focus below was on the configuration of the immediately prior district—but only because the immediately prior district was proof-positive that Republican voters *were* capable of forming the majority of a reasonably drawn district in the area.

C. Affirming the district court would not unduly entangle the Court in redistricting

At various times, the State (and its amici) have suggested that ruling in plaintiffs' favor will draw this Court into endless partisan gerrymandering challenges. That concern is significantly overstated.

A review of the Court's mandatory docket over the past three-plus decades indicates that there was no appreciable increase in the number of mandatory-docket lawsuits following this Court's recognition of a cause of action for racial gerrymandering in *Shaw* v. *Reno*, 509 U.S. 630 (1993). That is likely because the conditions that give rise to racial gerrymandering are relatively uncommon, and also because this Court's decision tamped down the practice.

So too here. The specific intent requirement serves as an important and effective filter against future challenges to redistricting maps under the First Amendment. As the district court made clear, the legislature's mere awareness of political consequences would not support a claim; a specific intent to target particular citizens is required. JS App. 201a. Cf. *Shaw*, 509 U.S. at 646 (same for race). Yet it is very unlikely that

the specific intent to single out the supporters of a particular political party for disfavored treatment would arise outside of States with single-party control of the governor's mansion and both chambers of the legislature. It also is very unlikely to arise in States that use independent commissions (like California and Washington) or that have adopted strict state constitutional limits on gerrymandering (like Florida and Pennsylvania). And, of course, any allegation of legislative intent would have to be a plausible one. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 677-82 (2009).

In the absence of an independent cause of action for partisan gerrymandering, moreover, concerned citizens have not stood silent. Rather, they have funneled their challenges through racial gerrymandering and racial vote dilution claims—an approach made possible "because, of course, 'racial identification is highly correlated with political affiliation.'" *Cooper*, 137 S. Ct. at 1473.

On that basis, congressional lines were challenged (by our count) in 22 States following the 2010 census. Affirming the judgment below is unlikely to encourage a significant expansion of those challenges. Instead, it will simply lead litigants to bring challenges under a different and more apt legal framework.[6]

Moreover, the public will easily recognize and appreciate the need for judicial intervention in those rare cases where legislatures fail to heed this Court's First Amendment teachings: When a legislature sets out to

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[6] Affirming the judgment below would, in this way, discourage an historically unhealthy focus on race in redistricting litigation. Cf. *Bush* v. *Vera*, 517 U.S. 952, 1004 n.2 (1996) (Stevens, J., dissenting) ("[T]he evils of political gerrymandering should be confronted directly, rather than through the race-specific approach that the Court has taken in recent years.").

fix elections and hobble the opposition party's ability to organize by targeting citizens for disfavored treatment on the basis of their protected conduct—and when those efforts impose clear, identifiable burdens like those present in this case—it is a plain violation of the law. The intelligent person on the street knows the difference between competition among the political parties in the marketplace of ideas and anticompetitive conduct like gerrymandering, meant to insulate the party in power from such competition.

IV. THE DISTRICT COURT PROPERLY ENTERED FINAL JUDGMENT FOR PLAINTIFFS

Uncomfortable in their defense of a practice that they acknowledge to be "impermissible" (Br. 27), the defendants change the subject, arguing that the decision below should be reversed because the district court committed numerous procedural errors. But the State's principal contention on this score—that there are genuine factual disputes warranting a trial—was waived below. Even on their merits, none of the State's arguments is availing.

A. The State waived any argument that there are genuine disputes of material fact

For the first time, the State asserts (Br. 50-58) that a trial was necessary to resolve genuine disputes in the evidence. It thus faults (Br. 51) the district court for improperly "resolv[ing] disputed facts pertaining to multiple elements of plaintiffs' claims." But the State has waived that argument by not raising it below.

1. The State did not oppose our motion for summary judgment by asserting that there were genuine disputes necessitating a trial. On the contrary, its cross-motion for summary judgment *admitted* that lawmakers "intended to create a new opportunity for Democratic electoral success" in the Sixth District

(Dkt. 186, at 28) and that Republican voters suffered a "disadvantage in the ability to elect a candidate of [their choice]" as a consequence (*id.* at 39). The State argued only that these (and other) facts were legally insufficient to establish a First Amendment violation. It did not contend in the alternative that, if the district court rejected the State's legal arguments and accepted ours, a trial would be necessary.

2. The State has thus waived any claim that a trial was required. "[A] party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered," and "[i]f it does not do so, and loses the motion, it cannot raise such reasons on appeal." *Ames* v. *Nationwide Mut. Ins. Co.*, 760 F.3d 763, 771 (8th Cir. 2014) (quoting *Liberles* v. *Cook County*, 709 F.2d 1122, 1126 (7th Cir. 1983)) (collecting cases).

This familiar rule applies to cross-motions for summary judgment. When a cross-moving party declines to argue that if its own motion is denied, genuinely disputed facts preclude summary judgment for its opponent as well, it waives such argument on appeal. *Cook Inc.* v. *Boston Sci. Corp.*, 333 F.3d 737, 741-42 (7th Cir. 2003); *May* v. *Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1116 (7th Cir. 1986); *Newark Morning Ledger Co.* v. *United States*, 539 F.2d 929, 932-33 (3d Cir. 1976).

That rule is dispositive here. Having declined to argue that there would be a genuine issue of material fact necessitating trial if the court denied its cross-motion, the State cannot raise that argument for the first time on appeal.

3. Another way to characterize the State's waiver is as a submission of the dispute as a "case ready for decision on the merits." *Empleados Del Tribunal Gen-*

eral De Justicia v. *Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.). The State explicitly disavowed (Dkt. 180, at 6) the need for an evidentiary hearing on our motion for a preliminary injunction, which was the same as our summary judgment motion.

When the losing party makes clear to the district court that it "didn't want a trial" (*Cook*, 333 F.3d at 742) and didn't need "additional factual evidence" or "to present witnesses" (*Empleados*, 747 F.2d at 36), courts construe cross-motions for summary judgment in non-jury cases as a submission of the case to the court for final judgment on the papers, in which case clear error review applies on appeal. *Cook*, 333 F.3d at 741-42; *Empleados*, 747 F.2d at 36. See also Mot. to Aff. 28 n.3 (collecting additional cases).

B. The State does not identify any genuine disputes of material fact

In any event, the State's *volte face* concerning the need for a trial is entirely without foundation.

The State allocates most of its argument to the wind-up, explaining at length (Br. 50-54) that judges are not supposed to weigh evidence or draw inferences at the summary judgment stage. But this prolonged treatment misses the point: "On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts.'" *Ricci* v. *DeStefano*, 557 U.S. 557, 586 (2009). And "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Ibid.* Here, the district court's conclusion that it could not rationally have found in favor of the State is fully supported by the record.

The State points to a grand total of three disputes that it now says warranted a trial. None did.

First, the State appears to suggest (Br. 53) that there was a dispute about associational burdens because the plaintiffs have been "politically active post-redistricting." That is a red herring. The point is that plaintiffs' ability to band together with *others* has been inhibited by the gerrymander's associational interruptions, not that they *personally* became disengaged in politics. See JS App. 60a-61a.[7]

Second, the State faults the district court (Br. 57) for "accept[ing] plaintiffs' characterization of 'the mapmakers' intent,' and refus[ing] to accept as true" the State's contention that the Sixth District's southward contortions "were driven by legitimate legislative decisions." No trial was warranted on this issue.

The evidence of intent is overwhelming and entirely one-sided. See pages 6-8, *supra*; JS App. 48a-51a. Conversely, there is literally no evidence to support the State's assertion (Br. 57) that lawmakers drew the Sixth District as they did solely out of respect for the "I-270 corridor economic region." In fact, the evidence flatly refutes it. See pages 13-14, *supra*; JS App. 55a. The district court rejected the State's other explanations because they were irrelevant: Even taking them as true, "none explains the dramatic exchange of populations between the Sixth and Eighth Districts." JS App. 55a. Our alternative map made this clear. See 3JA786-87.

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[7] The State also seems to fault the district court (Br. 55) for failing to consult certain "public record evidence" despite that the State did not bring such evidence to the court's attention. The court had no "duty to sift through the record," let alone the nebulous public record, "in search of evidence to support [the] opposition to summary judgment." *Crossley* v. *Georgia-Pac. Corp.*, 355 F.3d 1112, 1114 (8th Cir. 2004).

Finally, the State asserts (Br. 57-58) that there is a genuine dispute on the element of causation. But that shift is attributable to a change in the court's view of that law, not the evidence. The preliminary injunction decision had erroneously held that plaintiffs had to prove that the gerrymander alone would dictate the outcomes of all elections, past and future. JS App. 100a, 108a-13a. The opinion granting summary judgment corrected that error, holding that our burden was to show only that the plaintiffs "have been placed at a concrete electoral disadvantage" and not "that the line-drawing altered the outcome of an election." *Id.* at 52a.

We made all of these points in the motion to affirm (at 29, 31), but the State persists in its meritless contentions without rejoinder.

C. The State's evidentiary objections are meritless

The State further faults the district court (Br. 54-56) for relying on evidence to which the State had previously objected. That is wide of the mark.

1. With respect to the State's hearsay objections to Strine's and Ropp's testimony, there is nothing unusual about the denial of those objections *sub silentio*. As a general matter, "when a district judge enters an order disposing of a case without expressly ruling on a pending objection," the final judgment "functions as a final order overruling the objection." *Fielding* v. *Tollaksen*, 510 F.3d 175, 179 (2d Cir. 2007). The absence of express discussion is not a "basis for concluding that the district court did not consider [the] objection[]." *Hill* v. *SmithKline Beecham Corp.*, 393 F.3d 1111, 1116 (10th Cir. 2004). Accord, *e.g.*, *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 312 (2d Cir. 2008) (finding no error where "[hearsay] objections were implicitly overruled" by the grant of summary

judgment).[8]

Nor do the State's evidentiary objections hold up on their merits. Under Rule 803(3), neither Strine's nor Ropp's testimony was excludable because each relayed statements concerning the declarants' states of mind and mental feelings—in particular, how they "felt about voting" (State Br. 53).

Neither witness's testimony was offered to establish the truth of the matters asserted. Strine testified that "every time we were out [campaigning]," voters told her "it's not worth voting anymore." JS App. 26a. The testimony was not offered as proof that it literally wasn't worth voting. It was offered instead as evidence of voter sentiment, reflecting depressed voter interest and engagement. See *United States* v. *Brown*, 490 F.2d 758, 762-63 (D.C. Cir. 1973) ("the statement 'X is no good'" is not hearsay when entered as proof of "the declarant's state of mind toward X" because "[w]e do not care whether X is in fact 'no good' but only whether the declarant disliked [X]").

The same is true with respect to Ropp's testimony concerning voter confusion. JS App. 26a-27a.

2. The State's objection to the campaign finance reports (Br. 55-56)—which the district court expressly overruled (5JA1251-52)—borders on frivolous. The reports, which are publicly available on the State's own website, are "unsworn statements declared to be true under penalty of perjury" and thus admissible as "declarations" for purposes of Rule 56. *Williams* v. *Long*, 585 F. Supp. 2d 679, 685 (D. Md. 2008). The reports are also self-authenticating records of regularly con-

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[8] *Norse* v. *Santa Cruz*, 629 F.3d 966 (9th Cir. 2010) involved an improper *sua sponte* grant of summary judgment, when there was general "confus[ion about] precisely what constitute[d] the actual record." *Id.* at 973-974. That does not describe this case.

ducted activity under Rule 803(6). *E.g.*, *Doali-Miller* v. *SuperValu, Inc.*, 855 F. Supp. 2d 510, 515-19 (D. Md. 2012). And, even if they were not, they are subject to judicial notice. *E.g.*, *Malin* v. *XL Capital Ltd.*, 499 F. Supp. 2d 117, 133 (D. Conn. 2007). The reports obviously could have been admitted into evidence at trial. Cf. *United States* v. *Allen*, 10 F.3d 405, 412 (7th Cir. 1993) ("The district court did not abuse its discretion by admitting the [campaign finance] reports.").

The State complains (Br. 56) that it "had no opportunity to probe the * * * veracity" of the reports or to "submit rebuttal evidence." But because the State did not raise that objection below as a basis for excluding the evidence (see Dkt. 215-1), it is waived.

In any event, the State is wrong. Whether "support for [the Republican] party [was] diminished" (Dkt. 68, at 32) was a key element of the case starting with the second amended complaint (3JA645-46 (¶¶112-19)). For just that reason, the State entered other relevant evidence on the topic (*e.g.*, 4JA1059) and had ample opportunity to furnish evidence on party fundraising if it had wanted. Indeed, it had that opportunity in the two months that elapsed between the filing of the supplemental summary judgment briefs and its motion to strike, and again in the three weeks between the filing of its motion to strike and the hearing on the summary judgment motions. The State cannot fault the district court for its own strategic decision to file a dubious motion to strike rather than submitting additional public fundraising data of its own.[9]

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[9] The State did not need formal discovery to submit public fundraising reports in an affidavit. Its attempt to smuggle in such documents for the first time before this Court (Br. 8 & n.5, 56 & n.21) is plainly improper. Cf. Fed. R. App. P. 10(a).

D. The lower court acted within its discretion to enter a permanent injunction

The State says (Br. 58-63) the district court abused its discretion by entering a permanent injunction after so many years of litigation. It also accuses the district court (Br. 63-64) of failing to consider the broader public interests. Neither objection holds water.

1. **a.** The State makes three arguments concerning delay. First, it invokes laches. Br. 60. A party asserting laches must establish prejudice, however. *Giddens* v. *Isbrandtsen Co.*, 355 F.2d 125, 128 (4th Cir. 1966). The State's only effort to do so is its bald assertion (Br. 60) that the passage of time made it difficult "to preserve and access material evidence." Even if it had substantiated that claim, lost evidence would have *helped* the State because it did not bear the burden of proof. See *Costello* v. *United States*, 365 U.S. 265, 282 (1961). Regardless, any non-preservation of evidence is attributable not to delay, but to the State's own failure to issue or enforce litigation hold notices. See Dkt. 153-1 (motion for spoliation sanctions).

b. Second, the State implies (Br. 60-61) that ordering a new map near the end of the decade is "presumpt[ively]" improper. Yet courts order such relief often. *E.g.*, *Common Cause* v. *Rucho*, 2018 WL 4214334 (M.D.N.C. 2018) (injunction entered September 2018), jurisdiction postponed 2019 WL 98539 (U.S. 2019); *Perez* v. *Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017) (injunction entered August 2017), affirmed in part and reversed in part, 138 S. Ct. 2305 (2018); *Diaz* v. *Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (injunction entered February 1997), affirmed, 522 U.S. 801.

The State's contrary cases rest on facts absent here. In *White* v. *Daniel*, 909 F.2d 99, 104 (4th Cir. 1990), "there [were] no elections scheduled before * * *

[the next] census," meaning that the case was effectively moot. In *Skolnick* v. *Illinois State Electoral Board*, 307 F. Supp. 691, 694-95 (N.D. Ill. 1969), the passage of time made correcting the one-person-one-vote claim practically impossible. In *Chen* v. *City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000), the court ruled for the city on the merits because it "had valid reasons to adhere to its prior borders."

c. Finally, the State says this Court's opinion in *Benisek* tied the district court's hands, effectively foreclosing it from ruling in our favor on a permanent injunction. Yet the Court based its affirmance on plaintiffs' "delay in asking for preliminary injunctive relief" and the proximity of the 2018 election. *Id.* at 1943-45. Neither of these considerations is now applicable. JS App. 66a.

The district court—which had a front row seat to all aspects of the litigation for the past four-plus years—found that there were no "dilatory efforts" by either side, attributing the dragging-on of the litigation to "process." JS App. 66a. And as the State has conceded (JS 38-39), "there remain[s] time to implement a new plan for the 2020 election" in an orderly manner. A denial of relief for a "serious constitutional violation" simply because the litigation took years to conclude would "demean[]" plaintiffs' constitutional rights. JS App. 66a. The district court thus did not abuse its discretion by entering a permanent injunction.

2. The State accuses the district court (Br. 63-64) of failing to adequately consider the public interest—in particular "the impact its injunction will have on [other] voters." Yet the district court explained that vindicating an important constitutional right would naturally serve the public's interest and that "redrawing district lines to comply with the Constitution will not sow any additional confusion beyond that caused

by the illegal lines themselves." JS App. 67a. It noted also that there is ample time for the State to enact a new plan. Against this background, it was not an abuse of discretion to hold that an injunction would serve the public interest.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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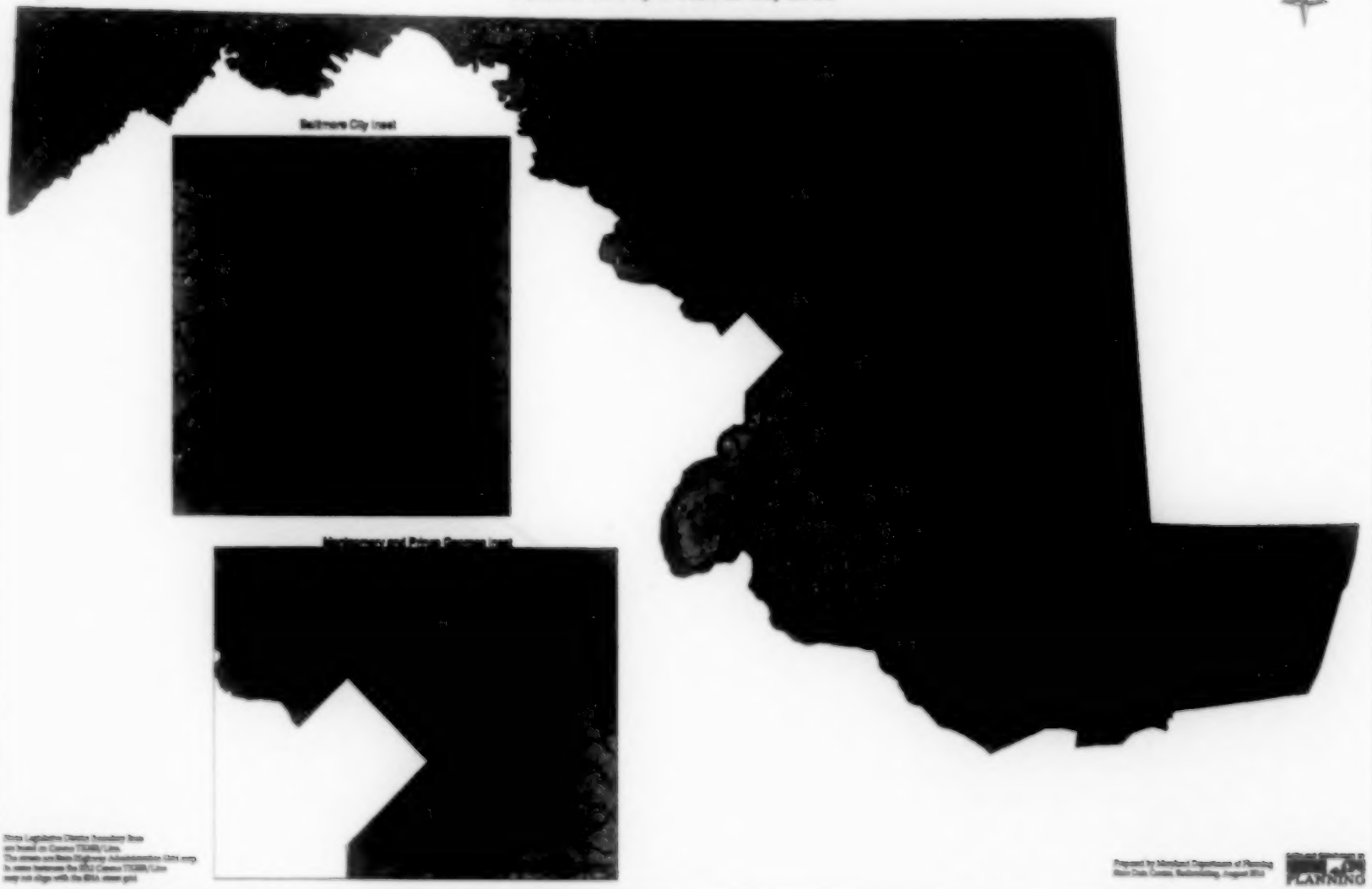
Maryland 2011 Congressional Districts

Senate Bill 1, October 20, 2011



2002 CONGRESSIONAL DISTRICTING PLAN

Senate Bill 805 May 6th, 2002